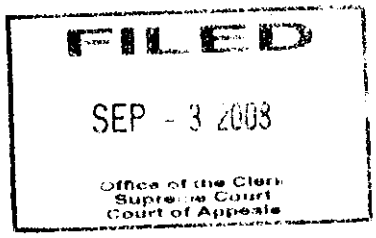
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CP-0544-COA

MURIEL PENNY — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE



APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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AUTHORITIES

I. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO PERMIT APPELLANT'S WITNESS TO TESTIFY AT EVIDENTIARY HEARING

On appeal, the appropriate standard of review for denial of post-conviction relief after an evidentiary hearing is the clearly erroneous standard.[1] A finding of fact made by trial court in post-conviction relief proceeding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made.[2]

Herein, If Penny's witness Lakesha Porter had been permitted to testify at the evidentiary hearing she would have testified that the state's lone corroborating eye witness, Sydatrine (Shay) Futrell, was no longer residing in the State of Mississippi. That she moved with her mother to Kansas City, Missouri. Thus she was unavailable to testify at the hearing. Thus evidence would have been presented to the trial court that the witness Futrell was unavailable pursuant to Mississippi Rules of Evidence.[3]

While the trial court enjoys a great deal of discretion as to the relevancy and admissibility of evidence, the trial court abused this discretion when it did not permit Porter to testify as to Futrell's statement against penal interest and her unavailability at the time of the hearing. Penney was prejudiced by the court's abuse of its discretion. He was not permitted to present evidence to the court that would warrant the granting of his post-conviction relief petition. His substantive due process right to a fair hearing was abridged. This matter should be remanded for a new evidentiary hearing. In the alternative, a new trial should be granted.

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[1] *Johns v. State,* 926 So. 2d 188 (¶ 29) (Miss. 2006).

[2] Id.

[3] M.R.E. 803(5), Hearsay Exceptions; Declarant Unavailable.

II. THE TRIAL COURT ERRED IN CONCLUDING APPELLANT PROVIDED NO DOCUMENTATION TO SUPPORT HIS CONTENTIONS.

On appeal, the appropriate standard of review for denial of post-conviction relief after an evidentiary hearing is the clearly erroneous standard.[4] A finding of fact made by trial court in post-conviction relief proceeding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made.[5]

Penny appeared at the evidentiary hearing pro se. The trial court could have had the exhibits Penny wanted the court to consider marked as exhibits for identification purposes. The court choose not to do so.

To succeed on a motion for a new trial based on newly discovered evidence, the petitioner must prove that new evidence has been discovered since the close of trial and that it could not have been discovered through due diligence before the trial began.[6] In addition, the petitioner must show that the newly discovered evidence will probably produce a different result or induce a different verdict, if a new trial is granted.[7] Evidence is material only if there is a reasonable probability (i.e. "probability sufficient enough to undermine confidence in the outcome") that, had the evidence been disclosed to the defense, the

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[4] *Johns v. State*, 926 So. 2d 188 (¶ 29) (Miss. 2006).

[5] Id.

[6] *Crawford v. State*, 867 So. 2d 196 (¶ 9) (Miss. 2003) (citing *Meeks v. State*, 781 So. 2d 109, 112 (Miss. 2001)).

[7] Id.

result of the proceeding would have been different.[8]

Herein, Porter's proposed testimony was clearly material. Futrell was the state's lone corroborating eye witness. If Porter had been permitted to testify in Penny's behalf she would have informed the court that Futrell's statement against penal interest was made after the close of trial and was thus new. Furthermore, she would have testified that Futrell's statement could not have been discovered before or during the trial.

If the court had permitted argument, Penny could and would have argued that this newly discovered evidence probably will produce a different result or induce a different verdict if a new trial is granted. The newly discovered evidence effectively impeached the state's lone corroborating eye witness Futrell and would have left the state with only the alleged child victim's testimony. Finally, it must be recalled that Penny was originally charged with two counts of sexual battery. He was convicted of the lesser included offense of child fondling.

III. THE EVIDENCE PRESENTED AT EVIDENTIARY HEARING CONSTITUTED HEARSAY TESTIMONY.

As previously supported in Appellant's Brief, the proffered testimony was not hearsay. The proffered testimony constituted an exception to the hearsay rule[9] or non-testimonial hearsay that does not trigger the need for confrontation to be admissible. It was reversible error for the trial court to summarily exclude the evidence as hearsay. This Court must grant Penny a new trial as a result. In the alternative, a second evidentiary hearing

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[8] *De La Beckwith v. State*, 707 So. 2d 547, 572 (Miss. 1997) (quoting *United States v. Bagley*, 473 U.S. 667, 681, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985)).

[9] M.R.E. 804(b)(3).

should be ordered.

CONCLUSION

For the foregoing reasons and authorities, Penny's petition for post-conviction relief should be granted. In the alternative, this matter should be remanded to the trial court for a second evidentiary hearing.

Respectfully submitted,

MURIEL PENNY

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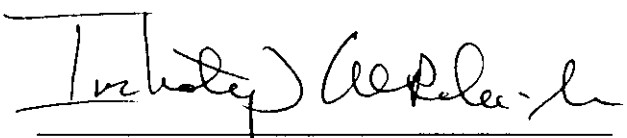
CERTIFICATE OF SERVICE

This is to certify that on the below date a true and correct copy of the forgoing was hand delivered and/ or mailed first class, postage prepaid, to the following individuals:

Jeffrey A. Klingfuss
Special Assistant Attorney General
P.O. Box 220
Jackson, MS 39205-0220

Judge Andrew Baker
P.O. Drawer 368
Charleston, MS 38921

This the 26TH day of August, 2008.



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